

February 24, 2005

EX PARTE - VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Level 3 Petition for Forbearance, CC Docket 03-266, WC Docket No. 04-36
Ex Parte Letter**

Dear Ms. Dortch:

Vonage Holdings Corp. ("Vonage" or the "Company") submits this letter in support of Level 3 Communications LLC's ("Level 3") Petition for Forbearance (the "Petition") filed with the Federal Communications Commission ("FCC" or "Commission").¹ Vonage believes that granting Level 3's Petition would benefit the entire communications industry by providing a simple, fair compensation mechanism applicable to all service providers² for the exchange of traffic between Internet Protocol ("IP") networks and the public switched telephone network ("PSTN"). By adopting a reciprocal compensation system for IP-PSTN traffic, the FCC would further advance its significant progress in developing a clear and comprehensive system of how traffic originating from and/or terminating to IP-enabled services should be treated nationwide.

Vonage supports Level 3's Petition because it will level the playing field for all carriers - removing doubt about how IP-PSTN traffic should be handled for purposes of intercarrier compensation. Approval of Level 3's request will also be consistent with the Commission's larger regulatory goals such as overall reform of the intercarrier compensation system, greater competition in the communications industry, and increased deployment of broadband Internet services. Vonage also believes that granting Level 3's Petition will increase economic clarity for IP-enabled services, which will drive investment in these technologies and services.

¹ See *Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) ("Level 3 Petition").

² IP-PSTN traffic exchanged with rural carriers, however, are exempt from Level 3's Petition pursuant to Section 251(f) of the Telecom Act. See *Level 3 Petition* at 8.

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1. Granting Level 3's Petition Will Advance FCC's Public Policy Efforts

Granting Level 3's Petition will advance the Commission's larger goal of intercarrier compensation reform. Although most parties agree that broad intercarrier compensation reform will be beneficial to the entire United States communications industry, quick action to address the specific issues faced by the emerging IP-enabled services industry is warranted at this time. VoIP providers and other carriers cannot wait until the FCC addresses intercarrier compensation for the communications industry as a whole.³ The IP-enabled services industry requires fast action on this matter before ILEC lawsuits seeking access charges for such traffic cripple this progressive communications sector.⁴ The Commission has recently determined the appropriate form of intercarrier compensation for both IP-IP and PSTN-PSTN IP traffic.⁵ The Commission should take this opportunity to address IP-PSTN traffic and finalize the compensation rules for all VoIP traffic.

The need for FCC action now is particularly acute for IP-PSTN providers. VoIP providers should not have to backwards-engineer their networks to comply with a broken PSTN intercarrier compensation system. The current system is built on several assumptions that do not hold true for IP-enabled services, namely: (1) that customers have a fixed geographic location; and (2) that telephone numbers are a proxy for fixed geographic location. As Vonage has previously explained,⁶ Vonage's customers can access Vonage's service from any location with a broadband Internet connection. This mobility is an integral part of Vonage's service (as well as related IP-enabled services provided by competing providers), which customers appreciate

³ See Press Release, Federal Communications Commission, FCC Moves to Replace Outmoded Rules Governing Intercarrier Compensation, Seven Comprehensive Reform Proposals To Be Weighed (Feb. 10, 2005); but see Statement of FCC Commissioner Kathleen Q. Abernathy Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking (adopted February 10, 2005) ("As reflected in the varying proposals submitted in the record, we are a long way from reaching consensus on appropriate reforms.") (emphasis added).

⁴ ILECs have already filed several suits over the past year seeking access charges for IP communications. See, e.g., *Southwestern Bell Telephone L.P. et al. v. VarTec Telecom, Inc. et al.*, E.D. Mo., Case No. 4:04-cv-01303-CEJ (filed Sept. 24, 2004); *Qwest Communications v. AT&T Corp., et al.*, D. Colo., Case No. 1:04-cv-00909-EWN-MJW (filed May 5, 2004); *Southwestern Bell Telephone L.P. et al. v. AT&T Corp. et al.*, E.D. Mo., Case No. 4:04-cv-00474-HEA (filed April 22, 2004).

⁵ See *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC-04-27 (rel. Feb. 19, 2004) ("Pulver Order"). See also *See Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004) ("AT&T Order"). The *Pulver Order* indirectly addressed the applicability of the access charge regime to IP-IP voice communications. The *AT&T Order* directly addressed the applicability of the access charge regime to "VoIP" communications originating and terminating on the PSTN (PSTN-PSTN traffic).

⁶ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Petition for Declaratory Ruling, at 2 (filed Sept. 22, 2003) ("Vonage Petition").

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and utilize.⁷ Subjecting VoIP and other IP-enabled services to the legacy access charge regime would create a chaotic regulatory environment, and encourage litigation concerning future and retroactive access charges. Within the technological confines of the current intercarrier compensation system, the FCC should require carriers to compensate each other for the exchange of IP-PSTN traffic under the competitive reciprocal compensation system.

Granting Level 3's Petition would also promote the FCC's broadband goals. Broadband penetration today is not ubiquitous. Millions of consumers have no broadband access, and those that do are usually faced with only one broadband supplier. VoIP deployment will encourage migration to broadband networks on both supply (network) and demand (consumer) sides.⁸ As VoIP deployment continues, carriers will invest in broadband infrastructure to capture VoIP and other IP-enabled services revenue streams.

VoIP and other IP-enabled services will also drive broadband adoption and competition.⁹ Vonage customers, for example, must have broadband access to use the Company's VoIP services.¹⁰ Granting Level 3's Petition would provide clarity on access charges, decrease the prices for VoIP services, and enable growth in the IP-services industry. This, in turn, will drive broadband deployment and adoption nationwide.¹¹ However, denying Level 3's Petition will

⁷ For example, Vonage offers an add-on "softphone" service which allows customers to transform laptop computers into VoIP communication devices that they can use anywhere in the world with a broadband Internet connection. See <http://www.vonage.com/features.php?feature=softphone>.

⁸ See Merrill Lynch, *Everything Over IP* at 3 (March 12, 2004) (concluding that VoIP will "add fuel to the broadband fire," making broadband a strategic necessity for telecommunications carriers).

⁹ See, e.g., UBS, *Gallup Survey Highlights VoIP Potential* at 8 (Apr. 8, 2004) ("UBS Study") (estimating 11.1 million VoIP subscribers by 2010).

¹⁰ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, ¶ 5 (rel. Mar. 10, 2004) (according to the Commission, "IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency.").

¹¹ In Merrill Lynch's study, the company listed three reasons why that company expects VoIP services to drive broadband deployment and adoption:

- (1) for customers, the opportunity to save on phone costs via VoIP lowers the effective cost of having broadband service; (2) for cable operators in particular, bundled offerings are more lucrative than standalone services, providing a further incentive to promote and expand service offerings; and (3) for telcos, there is increasing pressure to sell DSL in order to defend voice revenues. A customer lost to cable [high speed data] Internet service increasingly represents a potential loss of the entire customer relationship.

Merrill Lynch, *Everything Over IP* at 15 (March 12, 2004).

Another study states that ILECs will see increased incremental DSL revenues from VoIP-driven broadband demand. See Level 3 Ex Parte, WC Docket Nos. 03-226, 04-36 (Jan. 27, 2005), QSI Technical Documentation, *IP-Enabled Voice Services, Impact of Applying Switched Access Charges to IP-PSTN Voice Services*, 6-7 ("QSI Study").

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likely raise the price of VoIP services, put no additional pressure on traditional telephony services,¹² slow the growth of the IP-services industry, and, in turn, decrease overall demand for broadband Internet access.¹³

2. Granting Level 3's Petition Will Provide Needed Clarity to VoIP Providers

Granting Level 3's Petition will provide VoIP providers, as well as traditional telecommunications carriers, with certainty as to how IP-PSTN traffic will be handled for purposes of intercarrier compensation.¹⁴ The current uncertainty surrounding intercarrier compensation is restricting investment in VoIP technology and services, just as uncertainty about state regulation did.¹⁵ By promptly granting Level 3's Petition, the Commission will remove this uncertainty over VoIP services, and thereby increase the willingness of capital investors to support IP-based technologies and services. By applying the reciprocal compensation system to IP-PSTN traffic, the Commission will also lower the floor on VoIP pricing,¹⁶ which will thereby

¹² See, e.g., *UBS Study* at 2 ("The Bells are starting to roll-out video offerings based on their satellite relationships, while the cable operators continue to deploy IP-based telephony service in new markets. Both groups are encroaching on the cash cow of the other, which likely means further consumer benefits are on the horizon.").

¹³ See, e.g., *QSI Study* at 5 and Attachment 1 at 14.

¹⁴ See Merrill Lynch, *Everything Over IP* (March 12, 2004) (citing growth in IP-telephony market, and noting that all major cable and telecommunications carriers have either begun IP deployment, or announced plans to do so in the future). Vonage Holdings Corp. also recently reported that it had reached a milestone with over 400,000 lines in operation. See Press Release, Vonage Holdings Corp., Vonage Crosses 400,000 Line Mark; Biggest Broadband Telephony Provider Netted More than 300,000 Lines in 2004 (Jan. 5, 2005).

¹⁵ See generally *Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Ex Parte of Columbia Capital, WC Docket 03-266 (filed Feb. 14, 2005) (noting decreased levels of venture capital investment due to uncertainty over VoIP intercarrier compensation). See generally *Vonage Petition* (stating that state-based regulation would conflict with federal regulation, causing regulatory uncertainty). See also *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, at n.31 (rel. Nov. 12, 2004) ("Vonage Order") (finding Vonage's petition continues to present "a 'controversy' or 'uncertainty' regarding the jurisdictional nature of [Vonage's VoIP service]").

¹⁶ See, e.g., *AT&T And Internet Telephone Provider Vonage Are Cutting Prices For Their Residential Internet Calling Services By \$5 A Month*, USA TODAY, Oct. 1, 2004. Increased competition should also help the Commission in its strategic goal of universal service. Vonage believes that universal service is intended to benefit consumers, not individual companies. According to the Commission's universal service website:

The goals of Universal Service, as mandated by the 1996 Act, are to promote the availability of quality services at just, reasonable, and affordable rates; increase access to advanced telecommunications services throughout the Nation; advance the availability of such services to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas.

FCC, *Universal Service*,

http://www.fcc.gov/wcb/universal_service/welcome.html (emphasis added).

Vonage believes that the federal universal service program should support the most cost-effective supplier of communications service; it should not guarantee incumbent providers a revenue stream in perpetuity.

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lower the costs to consumers and put additional price pressure on traditional telephone competition, a stated goal of the FCC.¹⁷

The Commission's *Vonage Order*, as well as several decisions of federal courts,¹⁸ has significantly clarified the proper scope of regulation over Vonage's VoIP service. Vonage looks forward to continued development of this regulatory framework through the Commission's IP-Enabled Services proceeding,¹⁹ CALEA proceeding,²⁰ and other related proceedings. Level 3, however, filed its Petition to help eliminate uncertainty over the *carrier-to-carrier economic treatment* of VoIP and other IP-enabled services. The Commission should take this opportunity to address this issue, and provide carriers the necessary tools to develop a fair and rational system of compensation for IP-PSTN communications. Granting Level 3's Petition will help to prevent LECs and state regulators from applying inappropriate state-based access charge regimes to IP-PSTN traffic, consistent with the Commission's determination that state-based traditional common carrier obligations are generally inapplicable to certain types of IP-enabled services.²¹

¹⁷ On its website, the FCC has "Competition" listed as a Strategic Goal, noting that one objective under that goal is to "[f]oster sustainable competition across the entire telecommunications sector." *Competition*, <http://www.fcc.gov/competition/>.

¹⁸ See, e.g., *Vonage Holdings Corp. v. Minnesota Public Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), aff'd on other grounds, No. 04-1434 (8th Cir. Dec. 22, 2004).

¹⁹ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. Mar. 10, 2004).

²⁰ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865 (rel. Aug. 9, 2004).

²¹ See generally *Vonage Holdings Corp. v. Minnesota Public Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), aff'd on other grounds, No. 04-1434 (8th Cir. Dec. 22, 2004); see also *Vonage Order*; *Pulver Order*. Each of these determinations limits the applicability of common carrier regulations to VoIP services.

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For the foregoing reasons, Vonage submits this letter in support of Level 3's Petition. Vonage realizes that the FCC has a long road ahead in addressing intercarrier compensation, but that should not deter the Commission from granting Level 3's request at this time. VoIP and other IP-enabled service providers have found significant consumer demand for their products, but they require regulatory certainty in order to effectively deploy and market their services. It is clear that intercarrier compensation is a critical matter for IP-enabled service providers that must be addressed as quickly as possible. Positive action on Level 3's Petition will remove the regulatory uncertainty surrounding intercarrier compensation for IP-enabled services which is hobbling the industry, at the same time allow the Commission to complete the overall reform of intercarrier compensation. The time is right for the Commission to act as Level 3 requests.

Sincerely,

/s/

William B. Wilhelm, Jr.
Ronald W. Del Sesto, Jr.

Counsel for Vonage Holdings Corp.

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin